

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PROMEDEV, LLC,

Plaintiff,

v.

ROBY WILSON, et al.,

Defendants.

CASE NO. C22-1063JLR

ORDER

On April 1, 2024, the court ordered Plaintiff / Counter-Defendant Promedev, LLC (“Promedev”) to show cause why the court should not grant summary judgment on its breach of contract claim to Defendants / Counterclaimants Roby Wilson, MaXXiMedia Advertising Co. (“MaXXiMedia”), and Imagipix Corporation (collectively, “Defendants”). (4/1/24 Order (Dkt. # 93) at 22.) Promedev timely responded. (Resp. (Dkt. # 96).) Based on Promedev’s response, the court is satisfied that a reasonable jury could find that MaXXiMedia breached the parties’ July 31, 2020 Agreement. (*See generally id.*; 1/18/24 Wilson Decl. (Dkt. # 58) ¶ 8, Ex. A (“Agreement”).)

1 The court is not convinced, however, that Promedev’s “elect[ion] to seek
2 restitution for the commission payments it made to Maxximedia for the months of
3 September-December 2022” is a valid remedy for Defendants’ alleged breach of
4 contract. (*See* Resp. at 4; *see also* Pl. MIL Resp. (Dkt. # 101) at 1 n.1 (“Promedev’s
5 claim for breach of contract seeks only restitution . . .”).) “Restitution” as an alternative
6 remedy for breach of contract may take three forms: (1) rescission for material breach; (2)
7 performance-based damages; and (3) profit from opportunistic breach. Restatement
8 (Third) Restitution & Unjust Enrichment §§ 37-39 (Am. L. Inst. 2011). Promedev’s
9 attempt to recoup commission payments it owed under the Agreement and paid after
10 MaXXiMedia’s alleged breach does not, in the court’s view, fit neatly into any of these
11 categories.


12 First, Promedev represented in its summary judgment briefing that it made those
13 commission payments as part of its obligations under the Agreement, which provides that
14 in the event of termination, Promedev “shall promptly pay all sums owed . . . including
15 any future non-cancelable commitments after the termination date.” (Agreement ¶ 13.)
16 Promedev acknowledged that the “2022 ad buy . . . was non-cancellable” (Pl. MSJ (Dkt.
17 # 72) at 2) but “paid” MaXXiMedia’s commissions for the remainder of 2022 “early” (Pl.
18 MSJ Reply (Dkt. # 84) at 3). The court relied on Promedev’s representations in granting
19 it summary judgment on Defendants’ claim that Promedev breached the Agreement by
20 failing to make payments for future media placement services. (*See* 4/1/24 Order at 14
21 (“The evidence establishes that Promedev paid MaXXiMedia’s commissions for August
22 through December 2022 on August 29, 2022, before the effective date of termination.”).)

1 Second, Promedev made the commission payments after MaXXiMedia’s alleged
2 breach. The court’s show cause order directed Promedev to “provide evidence sufficient
3 for a reasonable factfinder to conclude that . . . Defendants breached a duty under the
4 Agreement” (4/1/24 Order at 22), and all of the evidence Promedev provided in response
5 comes from July 2022 (*see* Resp. at 1-3). Promedev made the relevant commission
6 payments, however, on August 29, 2022. (*See* 2/5/24 Wagner Decl. (Dkt. # 65) ¶ 20(d)
7 (“On August 29, 2022, Promedev issued a check to Maxximedia . . . representing
8 commission payments for the months of . . . September, October, November, and
9 December 2022.”).) It therefore does not appear that Promedev “treat[ed] the contract as
10 at an end and sue[d] for restitution.” (*See* Resp. at 4 (quoting *Scott v. Carr*,
11 C20-0236RSM, 2021 WL 3788941, at *3 (W.D. Wash. Aug. 26, 2021)); *see also* Pl. MSJ
12 at 9 (“Maxximedia acknowledged repeatedly that the Agreement’s termination only
13 became effective after August 31, 2022.”).)

14 The court has been unable to locate a single case in any jurisdiction in which a
15 court awarded the sort of restitution Promedev seeks—that is, restitution for funds (1)
16 paid in accordance with a contract (2) after the alleged breach occurred and (3) sought as
17 an alternative to damages. Therefore, pursuant to Federal Rule of Civil Procedure 56(f),
18 the court ORDERS Promedev to show cause why the court should not grant summary
19 judgment to Defendants on Promedev’s breach of contract claim for failure to establish
20 recoverable damages. Promedev’s response shall explain, with citations to supporting
21 case law, why restitution of the September-December 2022 commission payments is
22 available as an alternative remedy to damages for Defendants’ alleged breach of contract.

1 Promedev's response may not exceed 2,500 words and shall be submitted to the court by
2 no later than **12:00 p.m. PDT on April 16, 2024**. Defendants may file an optional reply
3 brief not to exceed 1,500 words by no later than **5:00 p.m. on April 17, 2024**.

4 Dated this 12th day of April, 2024.

5 
6 JAMES L. ROBERT
United States District Judge